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No. 01-164

IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED ON REVIEW

1. Whether this Court should dismiss this Petition for Certiorari as the grant of a new trial by the Superior Court of Pennsylvania is interlocutory?

2. Whether, in an action under the Federal Employers' Liability Act, evidence that plaintiff would have been entitled to Railroad Retirement Administration and service-related pension benefits so as to diminish his working life expectancy is barred under the collateral source rule?

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STATEMENT OF THE CASE

On February 7, 1994, Joseph Griesser suffered serious and permanently disabling injury as a result of the negligence of his employer, National Railroad Passenger Corporation ("Amtrak"). Griesser brought an FELA action against Amtrak in the Court of Common Pleas of Philadelphia County. While Griesser's claim included damages for future loss of earning capacity, he at no time claimed damages to compensate him for loss of his retirement benefits. Griesser's economist testified that his future economic loss based upon the projected current earnings for Griesser's former position with Amtrak amounted to $53,033.00 per year which, when reduced by taxes and present value, equaled $849,409.00. Griesser's economist based his work-life expectancy on various tables published by the United States government.

During the trial, Amtrak's counsel asked Griesser's economist the following question:

> Q. Are you aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits?
>
> A. No. I don't know the exact wording of it.

Griesser's counsel objected to the question and claimed that Amtrak improperly inquired into collateral source benefits. The trial court overruled the objection, but cut off any further cross-examination by Amtrak on this issue.

Nonetheless, during Amtrak's case, it presented an economist who testified as to Griesser's future lost wages as follows:

> I measured -- assuming he would retire at 60, 62, and 66. Sixty is the age given [Griesser's] seniority he could have retired from the railroad and would have been eligible for benefits....[A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

Griesser objected to this question as being violative of the collateral source rule. Despite the fact that there are in existence numerous tables that deal with the potential working life expectancy of a railroader without mention of retirement benefits, Amtrak persisted in this questioning and Griesser's objection was denied. The patent fallacy that a retiree would "basically be making" as much money as a railroader earning $55,000.00 a year underlies the inappropriate purpose for which this testimony was proffered.

After a five-day trial, a jury found that Griesser was 50 percent contributorily negligent and that he had suffered a loss prior to diminution of $419.500.00. As to future lost wages, the jury determined that Griesser would have lost $162,562.00.

Griesser appealed to the Superior Court of Pennsylvania which vacated the judgment and remanded this matter for a new trial. The Superior Court concluded that the trial court had erred in permitting collateral source evidence to be presented to the jury. As the Superior Court explained, in the context of the case before it:

> [T]here remains a significant danger that a jury will misuse and misinterpret evidence of early retirement benefits. For example, the jury could conclude that Amtrak was liable for lost wages until age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that [the plaintiff] was entitled to benefits only to age 60 and was attempting to seek a double recovery of benefits after age 60. In short, this evidence distracts the jury from the issues in the case and has a strong likelihood of prejudicing the plaintiff. Thus, we conclude that evidence of [plaintiff's] future retirement benefits was inadmissible to show that [he] had an economic incentive to retire before age 65, because of the danger that the jury would use

> this evidence for the improper purpose of mitigating [his] damages or reducing [the railroad's] liability. In this way, we adhere to the underlying purpose of the collateral source rule in light of the strong policy against the admission of collateral benefits in FELA cases.

Griesser v. National R.R. Passenger Corp., 2000 WL 1538611, *6 (Pa. Super. October 19, 2000).

Amtrak filed a petition for allowance of appeal to the Supreme Court of Pennsylvania which was denied.

ARGUMENT

A. *The Decision of the Superior Court of Pennsylvania Granting a New Trial Is Not a Final Order Nor Has it Been Rendered by the Highest Court of the Commonwealth of Pennsylvania. Therefore, this Court Lacks Jurisdiction Over this Matter and the Petition Should Be Dismissed.*

28 U.S.C.A. §1257 delineates the Supreme Court's power to review cases litigated in the state courts. 28 U.S.C.A. §1257; *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 77-78 (1997); *Budinick v. Becton Dickinson and Co.*, 486 U.S. 196, 201-02 (1988). The statute provides, *inter alia*, that a state court judgment or order is eligible for writ of certiorari only where it is a *final* judgment, rendered by the state's highest court. 28 U.S.C.A. §1257(a); *see also Jefferson*, 522 U.S. at 77-78; *accord Budinick*, 486 U.S. at 201-02 (finality, with respect to an appeal from a state court judgment to the Supreme Court of the United States, is determined by §1257). An order granting a new trial is interlocutory and not subject to immediate appeal, *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 34 (1980), as is virtually any order that does not resolve the merits of the case but "decides only one thing--that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).

While Pennsylvania permits its state courts to hear interlocutory appeals of non-final orders, federal law disallows such "piecemeal appeals." *Id.* at 24. To the extent that Pennsylvania's constitution or laws contravene federal law, they are preempted. *Budinick*, 486 U.S. at 198 (citing,

28 U.S.C. §1652[1]). Accordingly, this Court is not empowered to review the order in issue.

Further, the decision of the Superior Court of Pennsylvania is not a decision of the state's highest court, *see* 42 Pa. Cons. Stat. Ann. §501 (West 1992), and for this reason alone certiorari should be denied. The decision of the Supreme Court of Pennsylvania denying the allowance of appeal is the only mandate from the highest court of the Commonwealth of Pennsylvania. That determination is uniquely within the discretion of the Supreme Court of Pennsylvania, Pa. R.A.P. 1114, and, as petitioner has not filed its petition from that decision, even this discretionary rule is not before this Court. *See Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *see also Nutrasweet Co. v. X-L Engineering Co.*, 227 F.2d 776, 786 (7th Cir. 2000).

Therefore, as a matter of fundamental federal law, the Court should deny the petition as it seeks to obtain review of a non-final order or judgment.

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[1] "The laws of the several states, *except* where the Constitution or treaties of the United States *or Acts of Congress* otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C.A. §1652 (emphasis added).

B. *In an Action Under the Federal Employers' Liability Act, Evidence That Griesser's Future Working Life Expectancy Would Have Been Diminished as a Result of His Entitlement to Railroad Retirement Administration and Service-related Pension Benefits Was Properly Disallowed Under the Collateral Source Rule.*

It is not inconsequential that Amtrak has failed to cite a single FELA decision which permits the introduction of RRA pension benefits under the circumstances at bar. There is no split of authority within the Circuits on this issue.

It is well established that benefits to which a plaintiff is entitled to receive from a source collateral to a tortfeasor may not serve to mitigate damages otherwise recoverable in a personal injury action. Indeed, this Court, as well as all other federal courts, have consistently recognized that the introduction of such benefits in an FELA suit as either evidence, argument, or judicial comment constitutes reversible error.[2] And as the Superior Court, in the present

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[2] *See Eichel v. New York Central R.R.*, 375 U.S. 253, 254-55 (1963); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35-37 (1963); *Hileman v. Pittsburgh & Lake Erie R.R.*, 546 Pa. 433, 685 A.2d 994, 997-98 (1996). *See also Reed v. Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128, 132-34 (3d Cir. 1991); *Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Mahon v. Reading Co.*, 367 F.2d 25, 28-31 (3d Cir. 1966); *Snyder v. Lehigh Valley R.R.*, 245 F.2d 112, 113-16 (3d Cir. 1957); *Sinovich v. Erie R.R.*, 230 F.2d 658, 660-62 (3d Cir. 1956); *Finley v. National R.R. Passenger Corp.*, 1 F.Supp.2d 440, 443-45 (E.D. Pa. 1998); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360, *3 (E.D. Pa., March 17, 1999); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108, *4-6 (E.D. Pa. December 5, 1995). *See further Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029, 1031-34 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995); *Phillips v. Western Co. of North America*, 953 F.2d 923, 929-30 (5th Cir. 1992); *Stillman v. Norfolk & Western Ry.*,

matter, itself fully appreciated, the same preclusionary rule which prevents the admission of collateral source benefits to offset an FELA plaintiff's damages similarly prohibits a jury from considering such evidence in assessing the extent or duration of his injury.[3] The courts, therefore, heeding the pronouncements in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35-37 (1963), and *Eichel*, 375 U.S. at 254-55, have persistently foreclosed reference to an FELA plaintiff's receipt of RRA disability payments to suggest that he was malingering or had a motive, apart from his disability, for not

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811 F.2d 834, 838 (8th Cir. 1981); *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059, 1060-62 (6th Cir. 1984); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 199-200 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 651-53 (9th Cir. 1980); *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351, 353-54 (5th Cir. 1980); *Raycraft v. Duluth, Missabe & Iron Range Ry.*, 472 F.2d 27, 28-29 (8th Cir. 1966); *Schroeder v. Pennsylvania R.R.*, 397 F.2d 452, 456-57 (7th Cir. 1968); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 820-22 (5th Cir. 1965); *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 434-36 (D.C. Cir. 1965); *New York, New Haven & Hartford R.R. v. Leary*, 204 F.2d 461, 467-68 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953); *Lucht v. Chesapeake & Ohio Ry.*, 489 F. Supp. 189, 190 (W.D. Mich. 1980). *And see Descoteau v. Boston & Maine R.R.*, 101 N.H. 271, 278-79, 140 A.2d 579, 585-86 (1958); *Brumley v. Federal Barge Lines, Inc.*, 78 Ill.App.3d 799, 396 N.E.2d 1333, 1339-40 (1979); *Morse v. Southern Pacific Transportation Co.*, 63 Cal.App.3d 128, 134-35, 133 Cal.Rptr. 577, 579-80 (1976).

[3] *See Eichel*, 375 U.S. at 254-55; *Reed*, 939 F.2d at 132-34; *Vanskike*, 665 F.2d at 199-200; *Sheehy*, 631 F.2d at 651-53; *Raycraft*, 472 F.2d at 28-29; *Page*, 349 F.2d at 820-22; *Caughman*, 345 F.2d at 434-36; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Sinovich*, 230 F.2d at 660-62; *Descoteau*, 140 A.2d at 585-86; *Brumley*, 396 N.E.2d at 1339-40; *Morse*, 133 Cal. Rptr. at 579-80.

resuming some form of employment.[4] Moreover, notwithstanding Amtrak's contrary claim, they have, *without exception*, similarly held evidence that an FELA plaintiff, but for his injury, would have been eligible for RRA age- and service-related pension benefits inadmissible to show that he had a financial impetus to retire earlier than alleged regardless of the accident.[5] The legislative intent of the FELA and the RRA themselves, in fact, allow for no other conclusion, *Eichel*, 375 U.S. at 255, and to rule otherwise would completely abrogate the Supreme Court's decision in *Eichel*.

And, notwithstanding Amtrak's contrary claim, even *Eichel* itself recognizes that RRA age- and service-related pension annuities, given the statutory scheme of this Act, are, by definition, collateral. *Eichel*, 375 U.S. at 255. The courts, in fact, have consistently held that these benefits may not operate to diminish a plaintiff's recovery under the FELA whether[6] or not[7] he is presently entitled to these payments.

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[4] *See Vanskike*, 665 F.2d at 199-200; *Sheehy*, 631 F.2d at 651-53; *Raycraft*, 472 F.2d at 28-29; *Mahon*, 367 F.2d at 28-31; *Caughman*, 345 F.2d at 434-36; *Sinovich*, 230 F.2d at 660-62; *Morse*, 133 Cal. Rptr. at 579-80.

[5] *See Reed*, 939 F.2d at 132-34; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Brumley*, 396 N.E.2d at 1339-40. *See also Page*, 349 F.2d at 820-22; *Descoteau*, 140 A.2d at 585-86.

[6] *See Page*, 349 F.2d at 820-22; *Sinovich*, 230 F.2d at 660-62 (last moment reiteration by defense counsel of previously barred evidence of FELA plaintiff's receipt of RRA pension benefits required a new trial; the "effect of this [evidence] though it cannot be measured precisely can be seen in the sum awarded" and "gravely and unwarrantably impaired the worth of plaintiff's claim to the jury"); *Chicago Great Western Ry. v. Peeler*, 140 F.2d 865, 868 (8th Cir. 1944)

Thus, although Amtrak strains to differentiate between RRA disability and age- and service-related pension benefits, not even the former were ever designed "to restore an injured [railroader] to a theoretical status quo."[8] *Hetrick*, 39 F. Supp. at 25. *See also Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1380 (9th Cir. 1987); *Leary*, 204 F.2d at 468 (relied on by the Court in *Eichel*, 375 U.S. at 254). Accident indemnity was simply never within the Congressional intent of the RRA,[9] which is "substantially a Social Security Act for employees of common carriers" created to facilitate the retirement of elderly railroad workers. *Eichel*, 375 U.S. at 254. *See also Green v. Denver & Rio Grande Western R.R.*,

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(FELA defendant was properly precluded from introducing evidence of plaintiff's receipt of RRA pension payments during cross-examination; "an employer cannot set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source"); *Sleeman v. Chesapeake & Ohio R.R.*, 290 F. Supp. 817, 826 (W.D. Mich. 1968), *aff'd in part*, 414 F.2d 305 (4th Cir. 1969) (retirement pension benefits are a collateral source of compensation which may not diminish an FELA plaintiff's damages under the Act); *Descoteau*, 140 A.2d at 585-86.

[7] *See Reed*, 939 F.2d at 132-34; *McCarthy v. Palmer*, 113 F.2d 721, 723 (2d Cir.), *cert. denied*, 311 U.S. 680 (1940) (followed by *New York, New Haven & Hartford R.R. v. Leary*, 204 F.2d 461, 468, *cert. denied*, 346 U.S. 856 (1953), a decision relied upon by the Supreme Court in *Eichel*, 375 U.S. at 254); *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Hughes v. Clinchfield R.R.*, 289 F. Supp. 374, 375-76 (E.D. Tenn. 1968); *Brumley*, 396 N.E.2d at 1339-40.

[8] In fact, not even eligibility for RRA disability payments is dependant upon injury occurring in the course of employment or as the result of a carrier's negligence. *Leary*, 204 F.2d at 467; *Hetrick v. Reading Co.*, 39 F. Supp. 22, 25 (D.N.J. 1941). Disability, therefore, is merely the occurrence upon which the right to these benefits accrues. *Hetrick*, 39 F. Supp. at 25.

[9] *See Leary*, 205 F.2d at 468; *Hetrick*, 39 F. Supp. at 25.

59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995); *Folkestad*, 813 F.2d at 1380; *Leary*, 204 F.2d at 468; *Sinovich*, 230 F.2d at 661; *Hetrick*, 39 F. Supp. at 25. And as "benefits received under such a system of social legislation are not directly attributable to the contributions of the employer,"[10] they "cannot be considered in mitigation of damages." *Eichel*, 375 U.S. at 254 (quoting *Leary*, 204 F.2d at 468).[11] Indeed, even the FELA's own setoff provision, 45 U.S.C.A. §55, permits no other result,[12] for the RRA's age

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[10] The "retirement fund is supported by tax collections from both the employer and employee...and to a limited extent, by the general public..." *Leary*, 204 F.2d at 468.

[11] *See Green*, 59 F.3d at 1031-34; *Folkestad*, 813 F.2d at 1380; *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 451 n.2 (8th Cir. 1984); *Sinovich*, 230 F.2d at 660-61; *Hughes*, 289 F. Supp. at 375-76.

[12] Section 55 states that:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to any injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

and service requirements remove *both* pension and disability benefits from coverage under this Section.[13] And to suggest

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45 U.S.C.A. §55. Under Section 55, therefore, the availability of a setoff depends not upon the source of the payments but on "whether they constitute a fringe benefit of employment secured by the [railroader] through his labor or are a contribution against FELA liability." *Perry v. Metro-North Commuter R.R.*, 716 F. Supp. 61, 62 (D. Conn. 1989). *See also Phillips*, 953 F.2d at 929-32; *Folkestad*, 813 F.2d at 1380; *Clark*, 726 F.2d at 450; *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 790 (5th Cir. 1972); *Hall v. Minnesota Transfer Ry.*, 322 F. Supp. 92, 94-96 (D. Minn. 1971).

[13] *See Leary*, 204 F.2d at 467-68 (current disability payments); *McCarthy*, 113 F.2d at 723 (possible future entitlement to pension benefits); *Hughes*, 289 F. Supp. at 376 (future pension benefits); *Hetrick*, 39 F. Supp. at 25 (future entitlement to disability benefits). *See also Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954 (D. Conn. 1992). As the court stated in Hetrick;

> It is our understanding that Congress by the passage of the [RRA] undertook to create a certain amount of economic security for employees of a railroad who engage in a work fraught with daily exposure to the hazard of injury, but peculiarly essential to the public. Under conditions defined in the law, this legislation was designed to permit elderly men to separate themselves from the service. In fact, the annuity is an inducement to the retirement of men reaching sixty-five years of age, and creates a corresponding influx of younger employees. In addition, the right to the annuity is accelerated when an employee of thirty years of service becomes totally and

otherwise would not only subvert the legislative intent of the RRA but Section 58 of the FELA which expressly preserves the rights of statutorily protected employees under other Acts of Congress.[14] *Hall.*, 322 F. Supp. at 94-96.

> permanently disabled. Under the [FELA] an injured employee is given the right to an award of damages for his injury...The object of the two pieces of legislation are entirely foreign to each other, and we are of the view that there never was a legislative intent that a jury [in determining a plaintiff's right of recovery under the FELA] was to draw into its calculations the annuities provided for by the [RRA] so that payments made by the employer under the latter legislation would be returned to it...Recovery under the [FELA] in such case is beside the point, because that is an attempted restorative alone.

Hetrick, 39 F. Supp. at 25 (followed by *Leary*, 204 F.2d at 468, a decision relied upon by the Supreme Court in *Eichel*, 375 U.S. at 254).

[14] Section 58 states that:

> Nothing in this act (45 USCS §§ 51, *et seq.*) shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress

45 U.S.C.A. §58.

Similarly lacking merit is Amtrak's claim that the opinion of the Superior Court erroneously precludes a trial judge from weighing the probative value against the prejudicial impact of collateral source evidence. In fact, though Amtrak insists otherwise, the collateral source doctrine does not merely operate as an evidentiary principle, but is, instead, a rule of substantive law. And, all courts that have addressed this issue have insisted that *Eichel* itself precludes such a balancing-of-factors analysis.[15] Indeed, these decisions have rejected outright the argument advanced by Amtrak that Federal Rule of Evidence 403 or its state counterparts have somehow displaced the restrictive language of *Eichel*.[16] *Eichel*, they maintain, has already performed this analysis and concluded, *as a matter of law*, that the introduction of collateral source benefits to challenge the extent or duration of an FELA plaintiff's injury is unduly prejudicial.[17] To the extent, therefore, that *McGrath v.*

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[15] *See Sheehy*, 631 F.2d at 652 (Federal Rule of Evidence 403 does not sanction deviation from *Eichel*); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) ("[n]othing in the...Federal Rules of Evidence authorizes departure from the rule so declared [in *Tipton* and *Eichel*]"); *Finley*, 1 F.Supp.2d 440 at 443 (under *Eichel*, a "court is not permitted to balance the prejudicial effect against the probative value of [collateral source] evidence"); *Lee*, 1995 WL 734108 at *5 (under Eichel, collateral source evidence "is not subject to a balancing-of-the-factors analysis" but "must be categorically excluded").

[16] *See Sheehy*, 631 F.2d at 652; *Riddle*, 563 F.2d at 1107; *Finley*, 1 F.Supp.2d 440 at 443; *Lee*, 1995 WL 734108 at *5. *See also Green*, 59 F.3d at 1033; *Reed*, 939 F.2d at 134; *Snipes v. Chicago, Central & Pacific R.R.*, 484 N.W.2d 162, 166-67 (Iowa 1992); *Laird v. Illinois Central Gulf R.R.*, 208 Ill.App.3d 51, 566 N.E.2d 944, 955 (1991); *Morse*, 133 Cal. Rptr. at 580.

[17] As the Ninth Circuit remarked in *Sheehy*:

Consolidated Rail Corp., 136 F.3d 838, 840-42 (1st Cir. 1998), cited by Amtrak, permits such an appraisal, it not only ignores the clear dictates of *Eichel* but is directly at odds with prevailing authority.[18] In fact, the only court to consider the *McGrath* opinion has specifically declined to follow its reasoning. *See Hottenstein v. Burlington Northern R.R.*, 1998 WL 378429, *1-2 (N.D. Ill., July 1, 1998). And as Amtrak fails to realize, even *McGrath* acknowledges the inherently harmful impact of collateral source benefits for, as was not

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> Rule 403 does provide great discretion to trial judges to make evidentiary rulings. The trial court's determination under the rule is discretionary and cannot be overturned on appeal except for abuse of discretion. [Citation omitted]. Nevertheless, the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases. Rule 403 is designed as a guide for the handling of situations in which no specific rules have been formulated. *See Advisory Committee's Note*, Fed.R.Evid. 403. In *Eichel*, the Supreme Court balanced the probative value of such evidence against any unfair prejudice and determined that in such cases, the value is greatly outweighed by possible prejudice.

Sheehy, 631 F.2d at 652. *See also Riddle*, 563 F.2d at 1107; *Finley*, 1 F.Supp.2d 440 at 443; *Lee*, 1995 WL 734108 at *5. *See further Green*, 59 F.3d at 1033; *Reed*, 939 F.2d at 134; *Snipes*, 484 N.W.2d at 166-67; *Laird*, 566 N.E.2d at 955; *Morse*, 133 Cal. Rptr. at 580.

[18] *See Reed*, 939 F.2d at 134; *Finley*, 1 F.Supp.2d at 443-44; *Lee*, 1995 WL 734108 at *5; *Hileman*, 685 A.2d at 997.

done in this action, it specifically requires that this evidence be accompanied by a specific limiting instruction from the bench.[19] *McGrath*, 136 F.3d at 841.

Moreover, to suggest, as does Amtrak, that Griesser had somehow "opened the door" to RRA pension testimony would completely abrogate the exclusionary rule barring their introduction for the precise purpose for which it was proffered in this action.[20] Thus, though some courts have created a *narrow exception* to *Eichel*, even they do not contemplate carte-blanche admission of collateral source benefits. As the cases cited by Amtrak themselves recognize, such evidence may be adduced in an FELA action only after a plaintiff *voluntarily* injects these payments into the case[21]

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[19] In fact, the courts, wary of the pervasive damaging effect of such evidence, warn that not even a curative instruction from the bench may eliminate its detrimental impact. *See Sheehy*, 631 F.2d at 652 (cautionary instruction was insufficient to dispel prejudice from erroneous admission of collateral source evidence; court should have stricken evidence or instructed jury to disregard it); *Page*, 349 F.2d at 821-22; *Finley*, 1 F.Supp.2d at 444 (not even curative instruction could mitigate harm from defendant's injection of collateral source evidence into FELA action; "[o]nce this prejudicial cat is out of the bag, it is difficult for a jury's verdict to be unaffected by this information").

[20] *See Reed*, 939 F.2d at 134; *Page*, 349 F.2d at 820-22; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *5; *Brumley*, 396 N.E.2d at 1339-40.

[21] *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 416 (8th Cir. 1995) (FELA plaintiff, in his case in chief, introduced documentary evidence which specifically referred to his worker's compensation coverage); *Lange v. Missouri Pacific R.R.*, 703 F.2d 322, 324 (8th Cir. 1983) (FELA plaintiff, on direct examination by his attorney, misrepresented that he was not receiving any disability income); *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367-71 (5th Cir. 1982) (Jones Act plaintiff, in his case in chief, introduced evidence that he had been paid

or makes a claim of financial distress in an effort to arouse the passions and sympathy of the jury.[22] Thus, the courts expressly reject the claim that evidence of an FELA plaintiff's likely age of retirement implicates this exception.[23]

The decision of the Superior Court of Pennsylvania that Railroad Retirement Administration and service-related pension benefits were collateral sources and, therefore, improperly admitted into evidence to diminish Griesser's damages is consistent with the prior decisions of this Court

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maintenance and cure).

[22] *See Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir. 1996); *Lange*, 703 F.2d at 324 (evidence admissible to impeach FELA plaintiff's assertion that he returned to work immediately following surgery as he had no savings or disability income); *Giddens v. Kansas City Southern Ry.*, 937 S.W.2d 300, 303-05 (Mo. App. 1996). Under these circumstances, collateral payments may be adduced for the limited purpose of testing the veracity of a plaintiff's claim of financial hardship. *See also Mateer v. Union Pacific Systems*, 873 S.W.2d 239, 244-25 (Mo. App. 1993) (counsel's comment that FELA provided only compensation to injured railroader did not open door to evidence that plaintiff was entitled to RRA benefits). Amtrak's suggestion that the Superior Court's decision is likely to produce confusion and inconsistent results in lower courts, therefore, is simply not accurate.

[23] *See Lee*, 1995 WL 734108 at *5-6; *Leake v. Burlington Northern R.R.*, 892 S.W.2d 359, 361-64 (Mo. App. 1995) (evidence of FELA plaintiff's receipt of RRA benefits was inadmissible to impeach his attorney's statement that he could not have retired from the railroad until he turned 65). *See also Sinovich*, 230 F.2d at 660-62 (evidence that plaintiff, since his accident, had retired from the railroad did not justify admission of evidence that he was receiving RRA pension benefits); *Descoteau*, 140 A.2d at 585-86 (evidence FELA plaintiff had retired and was receiving RRA pension benefits was inadmissible to rebut his claim that the railroad had never offered him alternate employment following his injury). Indeed, in the present action, Mr. Griesser did not even make a claim for lost retirement benefits.

and the other Circuit Courts of Appeals that have considered the issue. Accordingly, since the matter has already been decided by this Court and there is no conflict among the Courts of Appeals, there is no reason to issue a writ of certiorari.

CONCLUSION

For all the reasons set forth herein, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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